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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 71

I. N. GORDON,

Appellant,

vs.

STATE OF TEXAS,

Appellee.

APPEALED FROM THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

APPELLANT'S BRIEF

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BRIEF OF APPELLANT

I.

Official Report of Opinions Below

The Judgment of the County Court at Law, Hidalgo County, Texas, dated November 14, 1955, is recorded in Volume 2, Page 583, of the Criminal Minutes of the County Court at Law, Hidalgo County, Texas.

The Judgment of the Court of Criminal Appeals of the State of Texas was rendered May 23, 1956 (R. 18-21), and re-hearing was denied without written opinion on June 27, 1956 (R. 26), and such opinions of the Court of Criminal Appeals are not yet officially reported in the Reporter System.

II.

Jurisdiction

Jurisdiction of the Court is invoked under Section 1257, Paragraph 2, Volume 28, of the United States Code Annotated. Notice of appeal was filed September 21, 1956, which was within ninety days from the overruling motion for re-hearing dated June 27, 1956, such appeal being taken within the time allowed under rules 10 and 11, of the Supreme Court Rules. The Supreme Court of the United States noted probable Jurisdiction on January 28, 1957, and granted leave for appellant to proceed *in forma pauperis* on January 28, 1957.

III.

Statutes and Constitutional Provisions Involved in Appeal

The Constitutional provisions and statutes, which are involved in this appeal, are as follows, to-wit:

Article 666-3a, Sections 1, 3 and 4, pages 194, and 195
Article 666-12, Section 13, page 323
Article 666-21, Pages 29 and 30 of the 1956 Cumulative Annual Pocket part of the Volume 1A of the Penal Code.
Article I, Section 10, Clause 2, United States Constitution
Article I, Section 8, Clause 3, United States Constitution
Paragraph 1798, Section 1201, 19 United States Code Annotated

The complete text of the above mentioned statutes and constitutional provisions are copied at length and attached hereto as Appendix No. I.

IV.

Questions Presented for Review

The State of Texas has sought, by virtue of criminal prosecution of appellant for possession of untaxed or unstamped liquor, to make appellant pay the Texas State Liquor Tax Stamp on liquor purchased in the Republic of Mexico and which appellant was carrying through the State of Texas to the State of North Carolina. Appellant, in due time, presented his Motion to Dismiss the Complaint and Information (R. 2-4), his sworn Motion to Quash Complaint and Information (R. 4-6), Motion for Instructed Verdict (R. 14) and the written request for Instructions to the Jury (R. 15-18), to the County Court at Law, Hidalgo County, Texas, the Court of the first instance. It was contended by appellant in each of the above motions or requests, that the tax was repugnant to the Constitution of the United States. The contentions supporting such a position by the appellant are listed as follows, to-wit:

1. Appellant contends that such a tax as was sought to be imposed on the liquor in his possession by the State of Texas was such a tax as is prohibited by Article I, Section 10, Clause 2 (export and import clause) of the Constitution of the United States. Such a tax, is a tax, by a State on goods imported into the Continental limits of the United States from a foreign country which said goods imported were still in the original package in which they were purchased and in the hands of the original importer, and which said goods had not become a part of the general mass of goods of the State of Texas. Such tax being unconstitutional, was void, and not due the State of Texas, and could not support a prosecution of this appellant, charging possession of untaxed or unstamped liquor.

2. Appellant contends that such a tax as was sought to be imposed on the liquor in his possession by the State of Texas was such a tax or interference as is prohibited by Article I, Section 8, Clause 3 (the commerce clause) of the Constitution of the United States of America. Such tax, is a tax, on goods moving through the State of Texas in interstate commerce and which said goods were not intended for delivery or use in the State of Texas. Such tax being unconstitutional and not due the State of Texas, and could not support a prosecution of this appellant charging possession of untaxed or unstamped liquor.

V.

Concise Statement of Case

1. The appellant, his wife and daughter, residents of the State of North Carolina, entered the United States after an extended visit in the Republic of Mexico (R. 34), having in their possession liquor which they had purchased in the Republic of Mexico (R. 34). Such liquor was bought for consumption and use by appellant, his wife and daughter, and they intended to carry the same with them to the state of their residence, North Carolina. The appellant, his wife and daughter, did not intend to use, sell, dispose or deliver such liquor in the State of Texas (R. 35), and they so stated to the Texas officers (R. 34). Officers of the Texas Liquor Control Board sought to make appellant, his wife and daughter, pay a Texas State Liquor Tax on such liquor; appellant, his wife and daughter, refused to pay such tax saying that it was unconstitutional as to them and the liquor they were carrying (R. 34). Appellant, only, was arrested and charged with the offense of possession of an illicit alcoholic beverage in a container to which a Texas Tax Stamp had not been affixed, tried and convicted of such offense and was fined $100.00, plus Court costs (R.

33). The State of Texas maintains liquor stamp collection stations only at the Texas-Mexican border crossings, and there is no other place in the State of Texas where an individual can purchase liquor stamps to place on unstamped liquor (R. 33-34). The liquor brought into the United States by appellant, his wife and daughter, was still in the original container in which it was imported and had not passed from the control of the appellant, his wife or daughter, and had not become a part of the general mass of goods of the State of Texas (R. 35).

VI.

Argument

Appellant would show the Court that, in the various stages in the County Court at Law of Hidalgo County, Texas, and the Court of Criminal Appeals of the State of Texas, he duly presented his objections to the tax sought to be imposed on him for the reason that the tax was violative of the Commerce Clause and the Export and Import Clause of the United States Constitution. It is felt that the lower courts erred in not sustaining his contentions and the argument presented hereby to the Supreme Court is restricted to the constitutional questions.

Point I Restated

Appellant contends that such a tax as was sought to be imposed on the liquor in his possession by the State of Texas was such a tax as is prohibited by Article I, Section 10, Clause 2 (export and import clause) of the Constitution of the United States. Such a tax, is a tax, by a state on goods imported into the Continental limits of the United States from a foreign country which said goods imported

were still in the original package in which they were purchased and in the hands of the original importer, and which said goods had not become a part of the general mass of goods of the State of Texas. Such tax being unconstitutional, was void, and not due the State of Texas, and could not support a prosecution of this appellant, charging possession of untaxed or unstamped liquor.

Argument on Point I

The Constitution of the United States of America provides as to control of exports and imports into the United States as follows:

> Article I, Section 10, Clause 2: *No state shall,* without the consent of the Congress, *lay any Imposts or Duties on Imports or Exports,** except what may be absolutely necessary for executing its inspection laws; and the net produce of all Duties and Imposts, laid by any State on Imports or Exports shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of the Congress.

This provision of the Constitution was placed therein by the founding fathers of this country to eliminate the specific evil, that existed under the Continental Congress, of the various states imposing conflicting taxes on imports and exports with the resultant stifling of foreign trade. It was decided by the makers of the Constitution that the control of foreign trade should be vested in the central government so as to establish a uniform policy therefore for the entire

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* Emphasis added.

nation, and so that the interior states would not be at a disadvantage in comparison to the coastal or border states.

This provision of the Constitution was perhaps first interpreted in the case of *Brown* v. *Maryland*, 12 Wheat. 419, 25 S.C. 41º in the year 1827. Chief Justice John Marshall delivered the opinion of the court and set us the "original package" doctrine to define the limits where Federal control over imports ends and where the authority of the states begin. Chief Justice Marshall set up this doctrine in this language, page 439.

> "The constitutional prohibition of the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in making the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

The Chief Justice continues at page 448.

"It has been observed, that the powers remaining with the states may be so exercised as to be in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing powers of the states must have some limits. It cannot reach and restrain the action of the national government within its proper sphere.... These cases are all within the sovereign power of taxation, but could obviously derange the measure of Congress to regulate commerce and affect materially the purpose for which that power was given."

The *Brown* v. *Maryland* case involved a state statute of the State of Maryland requiring of importers of foreign articles a license before they could sell the same in the State of Maryland. The instant case involved an importer of a bale of dry goods who had sold the same in its original package without first obtaining a license. The Maryland statute included, among others, importers of wine, rum, brandy, whiskey and other distilled spirituous liquors and the court made no distinction as to the class of articles to be protected by the export-import clause in setting forth its ruling.

The next cases that interpreted this clause were the "License Cases" 46 U.S. 504, 5 How. 256 decided by the Supreme Court in the year 1847. These three cases were brought to the Supreme Court from the states of New Hampshire, Massachusetts and Rhode Island and involved

three separate town council ordinances requiring a license from the council before any liquor could be sold in the town in small lots. Each of the defendants was arrested for not having a license and fined. The justices of the court each wrote separate opinions in the cases. Mr. Chief Justice Taney, who argued for the State of Maryland in *Brown* v. *Maryland*, recognized the wisdom of the decision of the Court in the *Brown* case and said in connection therewith at page 574.

> "A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it any form, it will put it in the power of a maritime importing State to raise revenue for the support of its own government from citizens of other states, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. Such a power in a State would defeat one of the principal objects of forming and adopting the Constitution. It cannot be done directly, in the shape of a duty on imports, for that is prohibited. And as it cannot be done directly, it could hardly be a just and sound construction to accomplish precisely the same thing under another name, and in a different form."

Mr. Justice Catron in a separate opinion had this to say at page 600.

> "Had the gin imported been an import from a foreign country, then the license law prohibiting its sale by the importer would be void."

At page 609 Mr. Justice Catron says,

> "But while foreign liquors, imported according to the regulations of Congress remain the cask, bottle, etc., in the original form, the importer may sell them in that

form at the port of entry, or in any other part of the United States, nor can any State law hinder the importer from doing so; nor does it make any difference whether the imported articles paid a tax on its introduction or was admitted as a free article; until it passes from the hands of the importer, it is 'an import', and belongs to regulated 'foreign commerce' and is protected."

The court sustained the convictions of the three defendants but did so on the grounds that none of them were the original importers from abroad of the liquor sold.

The "original package" doctrine has been followed by the Supreme Court from the date of the *Brown* case to this. One of the latest expressions of the Supreme Court concerning this original package doctrine was in *Hooven & Allison Company* v. *Evatt*, 324 U.S. 652, 65 S.Ct. 870, decided April 9, 1945. This case involved an *ad valorem* tax by the State of Ohio on hemp and rope material imported from abroad by petitioners and stored in their warehouse in Xenia, Ohio. The imported materials were still in their original package but had not been put to use in manufacture of rope at the time that the assessment was made by the State of Ohio. The Supreme Court reviewed all the cases on imports and said, page 879,

"Although one justice dissented in Brown v. Maryland, supra, from that day to this, this court has held, without a dissenting voice, *that things imported are imports entitled to the immunity conferred by the constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported.** (Citing cases.)

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* Emphasis added.

The court held in the *Hooven & Allison* v. *Evatt* case that the imported article was not subject to taxation by the state until it had become incorporated in the general mass of goods of the state by being used in the manufacture of the goods for which it was intended. See also *Leisey* v. *Hardin*, 10 S.C. 681, 135 U.S. 100.

The above cases abundantly support the position of the appellant herein for the reason that he purchased the liquor in question in the Republic of Mexico. The liquor was imported into the United States by him and it was still in his possession in the original package in which it was imported at the time of the appellant's arrest (R. 34 and 35). Under the cases the appellant had the right to carry the liquor with him to his destination without taxation by the State of Texas or by any state that he might pass through to reach his destination. The Texas State Liquor Tax imposed was void. Such tax being void, the whole prosecution of the appellant must fall.

The Congress of the United States has acted with reference to imports of liquors by individuals into the United States by virtue of the Customs Act in 19 U.S.C.A. Section 1201, which says,

> "Except as otherwise especially provided for in this chapter, the articles mentioned in the following paragraphs, *when imported into the United States* or into any of its *possessions shall be exempt from duty.**
>
> Paragraph 1798
>
> (c) In the case of *any person** arriving in the United States who is a returning resident thereof—
>
> (2) articles *including not more than one wine gallon of alcoholic beverages** and not more than one hun-

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* Emphasis added.

dred cigars, acquired abroad as an incident of the journey from which he is returning, for his personal or household use, but not imported for the account of any other person nor intended for sale, if declared in accordance with the regulations of the Secretary of Treasury."

Here, then, by the very action of the Congress, the appellant has been included within the scope of importers protected under Article I, Section 10, Clause 2, of the Constitution. The appellant is allowed to bring into the United States one gallon of alcoholic beverages for his own personal use free of duty. The Congress having acted, any action by the State in the same field must yield to the supremacy of Congressional action by virtue of the Supreme Law of the Land Clause in the Constitution.

The appellant is not unmindful of the fact that the State will contend that the 21st amendment to the Constitution, changed this right of freedom of import with reference to intoxicating liquors. This question was resolved by the Supreme Court of the United States in *William Jameson Co., Inc.* v. *Morgenthau, Jr.*, 307 U.S. 171, 59 S.Ct. 804, decided in May 15, 1939. The case involved a liquor importer who contested the validity of the Federal Alcohol Administration Act and maintained that by virtue of the Twenty-first Amendment the control over intoxicating liquors was given to the several states. The Supreme Court overruled this contention saying, 59 S.Ct. 805,

"Here, the Federal Alcohol Administration Act was attacked upon the ground that the 21st amendment to the Federal Constitution, U.S.C.A., gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause and hence that Congress has no longer authority to control

the importation of these commodities. We find *no substance** in this contention."

In the case of *C. Adolph Low, et al.* v. *Alexander Austin*, 80 U.S. 517, 13 Wall. 29, decided January 29, 1872, the Supreme Court of the United States was concerned with an *ad valorem* tax imposed by the City of San Francisco on an importer of wines from France. The custom duties and import taxes imposed by the United States were paid on the wine and then the wine was stored in the warehouses of the plaintiff located in the City of San Francisco. The City imposed an *ad valorem* tax on the wines which the plaintiff paid under protest and sued to recover. The trial court held for the plaintiffs, this was reversed by the California Supreme Court and the California Supreme Court was in turn reversed by the United States Supreme Court. The Supreme Court, speaking through Mr. Justice Field, said, page 519,

> "The Supreme Court of California appears from its opinion, to have considered the present case as excepted from the rule laid down in Brown v. Maryland, because the tax levied is not directly upon imports as such, and, consequently the goods imported are not subject to any burden as a class, but only are included as part of the whole property of its citizens which is subjected equally to an ad valorem tax. But the obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, and that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, *until they have passed from the control of the importer or been broken up by him from their original*

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* Emphasis added.

*cases. Whilst retaining their character as imports, a tax upon them in any shape, is within the constitutional prohibition.** The question is not as to the extent of the tax, or its equality with respect to the taxes on other property, but as to the power of the state to levy any tax. . . . Imports, therefore, whilst retaining their distinctive character as such, must be treated as being without the jurisdiction of the taxing power of the State."

In the very recent case of *Parrott & Company* v. *City and County of San Francisco*, 280 P.2 881, decided by the California Court of Appeal on March 8, 1955, the same situation as in the *Low* v. *Austin, supra*, was considered and decided adversely to the local taxing authorities. This is a well reasoned opinion and reviews all the decisions concerning the rights of importers to bring liquor in free from taxation from the state until it has become incorporated in the general mass of the community. See also *Von Hamm Young Company* v. *City and County of San Francisco*, 178 P.2 745, decided by the Supreme Court of California, March 14, 1947.

For support of the contention that the tax involved in this case is purely an import tax, attention is directed to the statement of facts. It is uncontroverted in the statement of facts that the State of Texas maintains tax collection stations only on the Texas-Mexican Border, that none are maintained on any other borders of states adjacent to Texas (R. 33). Further and beyond that, the statement of facts shows that there is no other place in the State of Texas where an individual in possession of unstamped liquor can purchase the tax stamps except on the Mexican Border (R. 34). These two facts fully support the view

* Emphasis added.

that the tax stamp is enforced purely as a revenue raising import tax.

Appellant has been unable to find any Texas cases where the issue was raised as to the validity of a tax being placed on imports from a foreign country.

To review the foregoing law as applied to the appellant herein; the appellant brought his liquor into the continental limits of the United States after purchasing the same in a foreign country, to-wit: the Republic of Mexico (R. 32 and 34). The liquor was an import still in the hands of the appellant who imported it. It was in the same bottles as when imported (R. 35). This is sufficient to bring the appellant and his liquor within the rule of *Brown* v. *Maryland*, *supra*, and the cases following, but in this instance, Congress has gone further and legislated on the matter of importing liquor by a person in appellant's position. It has allowed them to bring in one gallon of alcoholic beverages, duty free, of any import tax by the United States, so long as the liquor is for the personal use of the person importing the liquor. The statement of facts shows that it was uncontroverted that the liquor brought in by the appellant was intended for his own personal use and was not for sale, use or disposition in the State of Texas (R. 35). This being true, the liquor could never become a part of the general mass of commodities in the state or be subject to taxation by the State of Texas. It matters not that the state tax is uniform as to all liquor in the State, the attempted tax on liquor brought in from the Republic of Mexico is void because it is laid in direct contravention of the prohibition of Article I, Section 10, Clause 2, of the United States Constitution. The tax being void, the appellant is not guilty of the offense of possession of unstamped liquor and the prosecution must fail for lack of an offense.

Point II Restated

Appellant contends that such a tax as was sought to be imposed on the liquor in his possession by the State of Texas was such a tax or interference as is prohibited by Article I, Section 8, Clause 3 (the commerce clause) of the Constitution of the United States of America. Such tax, is a tax on goods moving through the State of Texas in interstate commerce and which said goods were not intended for delivery or use in the State of Texas. Such tax, being unconstitutional and not due the State of Texas, could not support a prosecution of this appellant charging possession of untaxed or unstamped liquor.

Argument on Point II

This ground for reversal is based on the principle that no state can impose a tax on an article that is moving in interstate or foreign commerce. For some cases setting forth this doctrine see *Heyman v. Hays*, 35 S.C. 403, decided in 1915; *McLeod v. J. E. Dilworth Co.*, 64 S.C. 1023, decided in 1944; and *Michigan Wisconsin Pipeline Co.* v. *Calvert, et al.*, 74 S.C. 396, decided on February 8, 1954. This latter case was from Texas and decided that a taking tax on natural gas was an undue burden on interstate commerce.

The question first arises as to whether this appellant was engaged in interstate commerce at the time of his arrest. This question was settled by the Supreme Court of the United States in the case of *United States* v. *Simpson*, 252 U.S. 465, 40 S.C. 364. The Court held that an individual driving his car and carrying five quarts of whiskey for his own use and enjoyment was operating in interstate commerce when he crossed a state line carrying the liquor.

He was convicted under a Federal statute forbidding transportation of liquor into a state that forbade the manufacture and sale of liquor. The conviction was upheld by the Supreme Court.

The next question that arises is whether the Twenty-first Amendment to the Constitution of the United States changes the rule on goods moving in interstate commerce in so far as intoxicating liquors are concerned. The 21st amendment and the interstate commerce clauses are set forth below:

> *Article I, Section 8, Clause 3*: "The congress shall have power . . . to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."
>
> *The Twenty-first Amendment*: Section 1 The eighteenth amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The conflict between the Interstate Commerce Clause and the Twenty-first Amendment has been the subject of many opinions by the Supreme Court of the United States. One of the most recent is a 1944 case, *Carter* v. *Commonwealth of Virginia*, 64 S.C. 464, wherein the defendants were convicted fo. not complying with a regulatory measure by the State of Virginia over intoxicating liquors transported through the State of Virginia. The majority opinion of the Court says, page 468,

> "Whatever may be the effect of the Twenty-first Amendment, this record presents no problem that may not be resolved under the commerce clause alone. That Clause remains in the Constitution as a grant of power

to Congress to control commerce and as a diminution pro tanto of absolute state sovereignty over the same subject matter. The twenty-first amendment limits that grant of power as to intoxicating liquor by prohibiting 'transportation or importation into any State, Territory, or possession of the United States *for delivery or use therein** . . . in violation of the laws thereof. By interpretation of this court, the amendment has been held to relieve the states of the limitations of the commerce clause on their powers over such transportation or importation. *It has also been held that shipment through a state is not transportation or importation into the state within the meaning of the amendment.*" Collins v. Yosemite Park Co., 304 U.S. 518, 58 S.C. 1009. But in the present case we need not consider the power of Virginia under the twenty-first amendment to regulate through shipments. It is enough that Virginia could conclude, *in the absence of contrary Federal Legislation,** that she could not safely permit the transportation of liquor through her territory by those who concededly mean to break Federal laws and the rules of a neighboring state."

Mr. Justice Frankfurter concurred in the result of the case but would have based the decision on the Twenty-first Amendment. Granted, he sets forth some strong language in the favor of the Twenty-first Amendment, however, his reasoning was not adopted as the majority opinion.

The Supreme Court in *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 58 S.C. 1009, considered an injunction suit by the Yosemite Park Co., against the administrators of the Alcoholic Beverage Control Act of California to prevent them from enforcing the same within the confines of the Park.

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* Emphasis added.

The Court said that the taxation and regulatory parts of the act were separable and upheld the injunction against the regulations enforcement as an attempt to regulate liquor outside of the jurisdiction of the State of California. The Supreme Court allowed the tax portion of the Alcoholic Beverage Control Act *only** because the state had reserved the right to tax in the instrument ceding jurisdiction of the Yosemite Park area to the United States. The Court said, page 1017,

> "the excise tax imposed on the sale of liquor in the state is separable from the licensing or regulatory provisions of the Alcoholic Beverage Control Act and may be enforced independently as purely a tax or revenue measure."

The Court further said, page 1018,

> "The lower court was of the opinion that though the amendment (Twenty-first amendment) may have increased the State's power to deal with the problem . . . it did not increase its jurisdiction." With this conclusion we agree. As territorial jurisdiction over the park was in the United States, the state could not legislate for the area merely on the account of the Twenty-first amendment. *There was no transportation into California "for use and delivery therein."** The delivery and use is in the Park and under a distinct sovereignty. Where exclusive jurisdiction is in the United States without power in the State to regulate alcoholic beverages, the 21st Amendment is not applicable."

The important part of the above case is the fact that the Supreme Court recognized the separability of the taxing and the regulatory phases of the California Alcoholic Beverage Control Act, and that the Court would not have upheld

* Emphasis added.

the tax part of the act had it not been that for the reservation of the right to tax by the State of California in the ceding instrument.

Recognizing that there are numerous other cases by the United States Supreme Court concerning intoxicating beverages and the rights of the various states to control the traffic within their own borders, appellant states that the cases are all distinguishable. The cases were either concerned with the control of alcoholic beverages transported or imported into the state for delivery or use therein; or they were concerned with the regulation of the transit through the state to prevent an evasion of local laws. So far as the appellant is concerned, as shown by the statement of facts, the liquor he was carrying was not for delivery or use in the State of Texas but was merely in transit through the State (R. 34). The tax sought to be imposed by the State of Texas was a pure revenue measure and could not be considered to be a regulation of transit through the state to prevent an evasion of the local laws. As shown by the statement of facts, the State of Texas only attempted collection of the tax at the border crossing on the Texas-Mexican Border and that no collection is attempted by the State of Texas on any of its other borders (R. 33).

It is further shown that once the tax is paid by a person bringing liquor into Texas from Mexico, there is no control or supervision by the State at any other point (R. 34). This would lead to the conclusion that the collection of the tax is merely for revenue and not as a regulatory measure.

In *Von Hamm Young Co. Ltd.* v. *City and County of San Francisco,* 178 P.2 745, the Court was concerned with a suit by the plaintiff for return of taxes assessed by the local taxing authorities on goods, including intoxicating liquors, moving through the port of San Francisco to Hawaii. The Court held that the goods were not subject to local taxation

as they were in interstate commerce. The opinion of the California Supreme Court rendered in 1947 was unanimous and said,

> "Defendant also contends that the property tax, even if it did not apply to the bulk of the property in transit, applies to the plaintiff's intoxicating liquor stored in the San Francisco warehouses on tax day, on the ground that under the 21st amendment to the Federal Constitution the state may regulate interstate traffic in alcoholic beverages. The 21st amendment merely prohibits the importation of intoxicating liquors into a state 'for delivery or use therein . . . in violation of the laws thereof.' . . . Defendant relies on the concurring opinions in Duckworth v. State of Arkansas, 314 U.S. 390, 397, 62 S.C. 311; and Carter v. Commonwealth of Virginia, 321 U.S. 131, 139, 64 S.C. 464, 88 D.Ed. 605. These opinions were concerned, not with the taxation of property in transit, but with the regulation of such transit to prevent evasion of local laws. Moreover, the majority opinion in both cases rejected the view that the 21st amendment was applicable to the transportation of alcoholic beverages through a State. See, also Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 386, 64 S.C. 622, 88 L.Ed. 814; and cases collected in 84 L.Ed. 137; 55 Yale Law J. 815."

See also *State of Georgia* v. *Wenger*, 187 P.2 285, cert. denied 72 S.C. 41, rehearing denied 72 S.C. 105; *Alcohol Division of Tenn.* v. *State ex rel. Strawbridge* (1953), 63 S.2 358, by the Supreme Court of Alabama.

So let us consider the cases as they affect this appellant. Appellant was admittedly carrying intoxicating liquors and he crossed a state line, therefore he would come within the definition of *United States* v. *Simpson, supra,* and be con-

sidered as being in interstate commerce. Is the portion of the Texas Liquor Control Act that the appellant is accused of violating a regulatory measure or a revenue measure? Obviously, it is a revenue measure as the whole offense depends on whether the appellant has purchased liquor stamps and affixed them on the bottles of liquor which he brought in from Mexico; nothing else is asked of the appellant than to pay and place them on the bottle. Since it is a tax we are concerned with, the tax is not to be sustained simply because it is a part of a general regulatory statute, the taxing portion is severable from the regulatory portion of the statute under the reasoning of *Collins* v. *Yosemite Park Co., supra,* further, by virtue of the *Collins* case the tax on interstate commerce cannot stand as there is no agreement between the Federal Government and the State of Texas authorizing the State to impose a purely revenue raising tax on liquors moving through the state in interstate commerce. In fact, the Federal Government rather than giving the state additional freedom to act has actually restricted the states by the Congressional action in passing the Customs Act, Section 1201, Paragraph 1798, (c), (2), which allows the liquor to come into the continental limits of the United States free of any duty or tax. The fact that the Federal Congress has acted would further bring the tax sought to be imposed on the appellant within the rule set up in *Carter* v. *Commonwealth of Virginia,* which says that the state action can stand only in the absence of prior Federal action. The appellant, coming within all of the above classifications, the State of Texas could not impose a tax on the liquor he was carrying through the state. Such tax not being due to the State of Texas, the prosecution of this appellant for possession of unstamped liquor must be void at its inception and the trial court should have dismissed the prosecution when the matters above related were brought to its attention.

CONCLUSION

It is therefore respectfully submitted that this Court should reverse the decision of the Court of Criminal Appeals of the State of Texas, and dismiss the prosecution against this appellant.

Respectfully submitted,

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APPENDIX No. I

ARTICLE 666-3a. Definitions

The following definitions of words and terms shall apply as used in this Act:

(1) "Alcoholic Beverage" shall mean alcohol and any beverage containing more than one-half of one per cent (½ of 1%) of alcohol by volume which is capable of use for beverage purposes, either alone or when diluted.

(3) "Distilled Spirits" shall mean alcohol, spirits of wine, whiskey, rum, brandy, gin and any liquor produced in whole or in part by the process of distillation, including all dilutions and mixtures thereof.

(4) "Illicit Beverage" shall mean and refer to any alcoholic beverage manufactured, distributed, bought, sold, bottled, rectified, blended, treated, fortified, mixed, processed, warehoused, stored, possessed, imported, or transported in violation of this Act, or on which any tax imposed by the laws of this State has not been paid and the tax stamp affixed thereto; and any alcoholic beverage possessed, kept, stored, owned, or imported within intent to manufacture, sell, distribute, bottle, rectify, blend, treat, fortify, mix, process, warehouse, store or transport in violation of the provisions of this Act.

ARTICLE 666-17 Section 13

(13) It shall be unlawful for any person to have in his possession, transport, manufacture, or sell any illicit beverage.

ARTICLE 666-21 Fees and Taxes

There is hereby levied and imposed on the first sale in addition to the other fees and taxes levied by this Act the following:

The term "first sale" as used in Article I of this Act shall mean and include the first sale, possession, distribution, or use in this State of any and all liquor refined, blended,

manufactured, imported into, or in any other manner produced or acquired, possessed or brought into this state.

The tax herein levied shall be paid by affixing a stamp or stamps on each bottle or container of liquor. Said stamps shall be affixed in strict accordance with any rule or regulation promulgated in pursuance of this Act; provided, however, any holder of a permit as a retail dealer as that term is defined herein shall be held liable for any tax due on any liquor sold on which the tax has not been paid.

It shall be the duty of each person who makes a first sale of any liquor in this State to affix said stamps on each bottle or container of liquor and to cancel the same in accordance with any rule and regulation of the Board. The Board shall have power to relax the foregoing provision when in its judgment it would be impracticable to require the affixing of such stamp on the bottle or container, irrespective of any other provision of this Act. And any person, or persons, or association who violates any portion of this Section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00), or by imprisonment in the County Jail for not less than thirty (30) days nor more than one (1) year. Every holder of a permit authorizing the wholesaling of liquor, upon receipt of a shipment of liquor for sale within this State, under the provisions of this Act, shall prepare and furnish such information and such reports as may be required by rules and regulations of the Board. Any person authorized to export liquor from this State having in his possession any liquor intended for shipment to any place without the State, shall keep such liquors in a separate compartment from that of liquors intended for sale within the State so that the same may be easily inspected and shall attach to each such package of liquor so intended for shipment without the State a tax stamp of the kind and character that shall be required by proper rule or regulation denoting that the same is not intended for sale within the State. When such liquors are so kept and so stamped no tax on account thereof shall be charged. For defraying the expenses thereof, a charge of Twenty-five (25¢) cents shall be made for every

such stamp, except that a charge of Ten (10) cents shall be made for each such stamp placed on vinous or malt liquors of twenty-four per cent (24%) alcoholic content or less. All such permitees authorized to transport liquor beyond the boundaries of this State shall furnish to the Board duplicate copies of all invoices for sale of such liquors, within twenty-four (24) hours after such liquors have been removed from their place of business.

ARTICLE I, Section 8, Clause 1

The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the debts and provide for the Common Defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

Clause 3

To regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes.

ARTICLE I, Section 10, Clause 2

No state shall, without the consent of the Congress, lay any imposts or duties on Imports and Exports, except that which may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on Imports and Exports shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of the Congress.

AMENDMENT XXI Repeal of XVIII Amendment

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Con-

stitution, within seven years from the date of submission hereof to the States by the Congress.

CUSTOMS DUTIES

19 United States Code Annotated, Section 1201

Except as otherwise specially provided for in this chapter, the articles mentioned in the following paragraphs, when imported into the United States or into any of its possessions shall be exempt from duty.

Paragraph 1798

(c) In the case of any person arriving in the United States who is a returning resident thereof—

(1) All personal and household effects taken abroad by him or for his account and brought back by him or for his account; and

(2) articles (including not more than one wine gallon of alcoholic beverages and not more than one hundred cigars) acquired abroad as an incident of the journey from which he is returning, for his personal or household use, but not imported for the account of any other person nor intended for sale, if declared in accordance with regulations of the Secretary of Treasury.